No. 56172-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARK J. GOSSETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon, Judge
Cause No. 08-1-02102-9

ANSWER TO MOTION TO WITHDRAW PURSUANT TO RAP 18.3 AND STATE'S MOTION TO DISMISS

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A. ISSUES PERTAINING TO MOTION

1. The State agrees with counsel's assertion that a review of the record does not demonstrate a basis for a good faith argument on appeal. Where there is no basis for a good faith argument on appeal, this Court should grant the motion to withdraw and dismiss the appeal as frivolous.

B. STATEMENT OF THE CASE

The appellant, Mark Jonathan Gossett, was convicted following a jury trial of two counts of rape of a child in the second degree and two counts of child molestation in the second degree. CP 7-20. The offenses occurred between January 1, 2003 and November 25, 2003, however the evidence indicated that the disclosure occurred in 2008. *Id.*; Certification of Probable Cause, CP 206-207; Presentence Investigation Report, CP 209-214.[1] On August 4, 2010, this Court entered an order clarifying the judgment and sentence

[1] These documents were attached as Appendix B and C to the State's response to Motion for Post-Conviction DNA testing which were filed in the trial court.

with regard to contact with the Gossett's children while in prison. Order Amending and Clarifying Judgment and Sentence, CP 22-23.

Gossett appealed his convictions. Division II of the Court of Appeals affirmed his convictions but remanded to modify a community custody condition. State v. Gossett, 167 Wn. App. 1011, 2012 WL 830507 (2012).[2] Division I of the Court of Appeals later denied a personal restraint petition that Gossett filed in which he sought a new trial based on ineffective assistance of counsel and prosecutorial misconduct. Unpublished Opinion No. 71435-0-1, CP 242-276. In 2019, Gossett again filed a personal restraint petition. In a published opinion, this Court discussed the amended order clarifying the judgment and sentence regarding child visitation in the Department of Corrections. In re Pers. Restraint of Gossett, 7

[2] This unpublished opinion is offered under GR 14.1 and also as the law of the case in this particular matter. A copy of the opinion appeared at Appendix E of the State's response to Gossett's motion, CP 225-241.

Wn. App.2d 610, 435 P.3d 314 (2019).[3] This Court held that this Court's order clarifying the judgment and sentence was not binding on the Department of Corrections and upheld Department of Corrections visitation restrictions.

> Gossett then filed a series of motions in the trial court including a motion for post-conviction DNA testing. CP 312-316.[4] Gossett noted the motion for post-conviction DNA testing for a hearing on August 12, 2021. 1RP 3.5 Prior to the hearing, the State filed a written objection to Gossett's motion for post-conviction DNA testing. CP 184-311. At the August 12, 2021, hearing, the prosecutor noted that Mr. Gossett was not present and referenced the trial court to the State's written response, stating, Mr. Gossett not being here, I don't want to add much of anything to my response. I'm not sure if he just neglected to arrange to be present or what happened in that regard. Clearly, the State doesn't believe that DNA testing is appropriate, given what he filed. But that's our position.

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[3] A copy of this decision was attached to the State's Response to Motion for Post-Conviction DNA testing. CP 278-297.
[4] While the motion was considered by the trial court on August 12, 2021, Gossett's motion dated July 15, 2021, appears filed on June 13, 2022, as CP 312-316.
[5] For purposes of this response, the State will reference the hearing on August 12, 2021 as 1RP and the hearing on December 9, 2021, is referenced as 2RP.

1RP 4.

The trial court issued a ruling based on the pleadings, stating,

> The court, based upon the pleadings submitted by both Mr. Gossett and the State of Washington with respect to Mr. Gossett's motion for post-conviction DNA testing, finds that Mr. Gossett in his pleadings did not address the specific requirements of the statute, RCW 10.73.170(2). Mr. Gossett has not demonstrated or explained why the DNA evidence is material to the identity of the perpetrator. Mr. Gossett has not identified any specific object of evidence that should be tested. He has not alleged that there was a possibility that he was falsely identified as suspect. In this particular case, it involved a disclosure that was delayed for a significant period of time. Accordingly, DNA evidence would likely not have been located, let alone tested.

1RP 5. The trial court adopted written findings of fact consistent with its oral ruling. CP 148.

Gossett then filed a number of other motions in the Superior Court and retained the services of attorney Dana Ryan. 2RP 1-6. During a hearing on December 9, 2021, the prosecutor relayed the State's understanding of the posture of

those motions, including the motion for post-conviction DNA testing. 2RP 6. The prosecutor indicated,

> There's the post-conviction DNA motion that was previously stricken by Judge Dixon - - or denied by Judge Dixon on August 12, 2021. I listed that because it was referenced in some of the other motions. However, Mr. Ryan indicated that he was not asking to do anything different than what was previously ordered by Mr. - - - or Judge Dixon earlier today. So I don't believe we have to address the post come (sic) conviction DNA motion today.

2RP 6-7. The prosecutor later stated,

> As I previously indicated, the post-conviction DNA motioned (sic) already been before Judge Dixon, that was ruled on in a hearing where Mr. Gossett had arranged for the hearing but did not arrange to appear, and Judge Dixon had simply just denied the motion with an order at that hearing. It was mentioned in some of the other briefing, but we agreed – I talked with Mr. Ryan - - he agreed that they were not asking to do anything different than what Judge Dixon already did.

2RP 11. The prosecutor also described that Mr. Gossett had filed a motion for an evidentiary hearing regarding the lack of

reports from the Washington State Crime Lab, which the prosecutor stated,

> The State's position, obviously, is that everybody knew there wasn't testing at the trial or we would have had testimony about testing at trial. I believe Mr. Ryan understood that position and indicated that he wanted to strike that particular motion.

2RP 11-12. The trial court entered an order transferring the majority of Gossett's additional motions to this Court as a personal restraint petition under CrR 7.8(c)(2). CP 169-170. The personal restraint petition was initially dismissed by this Court on March 25, 2022, but the Court entered an order withdrawing the dismissal and allowing Mr. Gossett to voluntarily dismiss the petition on April 6, 2022. In re Pers. Restraint of Gossett, No. 56519-6-II.

Mr. Gossett filed a notice of appeal on August 30, 2021, seeking to appeal the denial of his post-conviction DNA motion, which is the issue presently before the Court. CP 168. Gossett's appellate counsel has filed a motion to withdraw

indicating that they are unable to identify non-frivolous issues for appeal.

C. ARGUMENT

1. The State concurs with the legal opinion of Appellant's counsel that there is no good faith basis for review under RAP 15.2(i) and therefore requests that this Court grant counsel's motion to withdraw and dismiss this appeal as frivolous.

RAP 15.2(i) allows appellate counsel to withdraw if counsel can find no basis for a good faith argument on review. Counsel for a defendant in a criminal case may withdraw only with the permission of the appellate court on a showing of good cause. RAP 18.3(1). The defendant's appellate counsel has filed an Anders brief asserting that they can find no basis for a good faith argument on review. Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 498 (1967). If counsel finds an appeal to be "wholly frivolous, after a conscientious examination" of the record, counsel should so advise the court and request permission to withdraw. Anders, at 744. If counsel seeks to withdraw, the appellate court may relieve counsel and

either dismiss the appeal or allow the indigent defendant to proceed pro se. State v. Hairston, 133 Wn.2d 534, 537, 946 P.2d 397 (1997). The State has reviewed this case and cannot find any viable issues. Thus, the State does not oppose counsel's motion to withdraw and asks that the appeal be dismissed.

The United States Supreme Court accepted a procedure to allow counsel to withdraw and to dispose of frivolous appeals. State v. Atteberry, 87 Wn.2d 556, 561, 554 P.2d 1053 (1976) (Citing Anders, at 744); Hairston, at 537-538. Our State adopted the procedure in State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970). The request to withdraw must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Anders, at 744. The indigent defendant should be allowed time to raise any points he chooses, and the Appellate Court, after a full examination of the proceedings determines whether the case is wholly

frivolous. *Id*. If frivolous, the Appellate Court may grant counsel's request to withdraw and dismiss the appeal. *Id*.

Here, counsel's motion to withdraw is accompanied by a brief which satisfies the Anders requirements. Counsel submitted a brief referring to issues in the record that might arguably support the appeal, to wit: 1) whether the trial court violated due process by deciding Gossett's motion for post-conviction DNA testing in his absence, 2) whether the trial court erred in denying Gossett's petition for post-conviction DNA testing and 3) whether the trial court failed to consider the evidence produced at trial. Motion to Withdraw at 3. The motion states that counsel reviewed the record, and the record from Gossett's original appeal, and that counsel wrote to Gossett explaining the Anders procedure and his right to file a pro se supplemental brief and serve him with a copy of the motion. Motion to Withdraw, at 2. Mr. Gossett, through counsel, has filed a motion for an extension of time to file a statement of additional grounds.

Gossett's motion for post-conviction DNA testing filed in Superior Court was frivolous and did not comply with RCW 10.73.170. Under RCW § 10.73.170(3), "The court shall grant a motion requesting DNA testing . . . if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." As part of the form required by subsection (2), the motion must "explain why DNA evidence is material to the identity of the perpetrator of ... the crime." RCW § 10.73.170(2). A trial court's decision on a motion for post-conviction DNA testing is reviewed under the abuse of discretion standard. State v. Riofta, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). A trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). "A discretionary decision 'is based "on untenable grounds" or made "for untenable reasons" if it rests on facts

unsupported in the record or was reached by applying the wrong legal standard.'" State v. Thompson, 173 Wash. 2d 865, 870, 271 P.3d 204, 206 (2012) (quoting Rafay, at 655).

In this case, Gossett's motion for post-conviction DNA testing was clearly frivolous. CP 312-316. The trial court correctly found that Gossett's petition for post-conviction DNA testing was insufficient because it did not demonstrate a likelihood that DNA testing would demonstrate innocence, did not explain how DNA testing was material to the identity of the perpetrator, did not identify any object to be tested, and did not allege a possibility that he was falsely identified. As the decision of this Court in Gossett's direct appeal notes, the victim in Gossett's case was Gossett's adopted child. State v. Gossett, 167 Wn. App. 1011, 2012 Wash.App.LEXIS 560, (No. 40845-7-II) at 2; CP 228. The opinion also makes it very clear that the allegations of sexual abuse were part of a delayed disclosure. *Id*. at 2-3. There was no possibility that the victim was mistaken as to who the perpetrator was and no likelihood

that DNA testing would demonstrate innocence based on the facts of the case and the delayed disclosure. The trial court properly found that Gossett did not meet the requirements of RCW 10.73.170 in his petition and that the decision was based on the record in the case as was relayed in the pleadings for the motion from both Gossett and the State.

This Court recently upheld a trial court's decision denying a motion for post-conviction DNA testing where the petitioner did not fulfill the statutory requirements of RCW 10.73.170 in State v. Cloud, 22 Wn. App.2d 1006, 2022 Wash.App.LEXIS 1066, 2022 WL 1555177 (2022).[6] In that case, the Court found that the petitioner did not explain why DNA evidence was material to the identity of the petitioner in their motion. *Id*. at 3. As the Court ruled in Cloud, Gossett's motion did not adequately address the requirements of RCW 10.73.170 and "the trial court's decision to deny the motion for

[6] Unpublished decision offered under GR 14.1.

post-conviction DNA testing was not manifestly unreasonable." *Id*. at 7.

Gossett did not make arrangements to appear on August 12, 2021, for the hearing that he noted. The fact that he was not present, however, does not violate the right to be present. The due process clause of the Fourteenth Amendment to the United States Constitution grants a criminal defendant "a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). However, this right to be present is not absolute. *Id*. at 881. A defendant has the right to be present at a proceeding only when there is a "reasonably substantial" relationship between their presence and the "opportunity to defend" against a charge. *Id*. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (internal quotations omitted), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964)). A defendant does not have the right to be present if their presence "would be

useless, or the benefit but a shadow." *Id.* *See* In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (concluding a defendant did not have a right to be present at a hearing on a motion for a continuance as his absence during that hearing did not affect his opportunity to defend the charge).

The trial court denied Gossett's motion based on the inadequacy of the pleading pursuant to RCW 10.73.170. The prosecutor was careful not to make argument that was not in the written pleadings when the Court denied the motion. Gossett's motion was not substantially related to defending against a charge at trial. There was no due process right for his presence. Moreover, his lack of presence was due to failing to make arrangements to appear at the motion that he scheduled. There is no appealable issue based on his absence at the August 12, 2021, hearing.

Assuming arguendo that Gossett did have a constitutional right to be present at his post-conviction hearing, there is no evidence that demonstrates his absence was harmful error. A

violation of the due process right to be present is subject to harmless error analysis. Irby, at 885. The burden of proving harmlessness is on the State. *Id*. Here, the pleadings and history of the case clearly indicate that post-conviction DNA testing under RCW 10.73.170 is unwarranted. Moreover, at the hearing on December 9, 2021, when the ruling denying the request for post-conviction DNA testing was discussed with counsel and Mr. Gossett present, there was no request to modify the ruling. Beyond a reasonable doubt, Gossett's presence, or lack thereof on August 12, 2021, did not affect the outcome of the proceeding. His motion for post-conviction DNA testing, as drafted and presented before the trial court, was frivolous.

For these reasons, the State does not oppose appellate counsel's motion to withdraw pursuant to the Anders procedure. RAP 18.9(c)(2) allows the Appellate Court to dismiss an appeal if the application for review is frivolous, moot, or solely for the purpose of delay. For all of the reasons

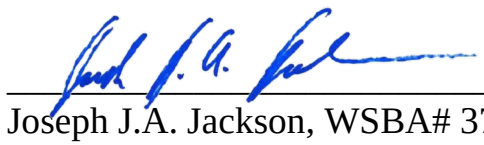
above, and for the reasons including in the State's response to Gossett's motion for post-conviction DNA testing, a review of the record does not provide a sufficient basis to continue this appeal. The issue is frivolous. The State therefore requests that this Court grant the motion to withdraw and enter an order dismissing this appeal pursuant to RAP 18.9(c)(2).

D. CONCLUSION

For the reasons stated above, the State agrees that there are no non-frivolous issues that can be raised in this appeal and does not oppose counsel's motion to withdraw. The State respectfully request that this Court dismiss this appeal as frivolous under RAP 18.9(c)(2).

I certify that this document contains 2784 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 25th day of August 2022.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 25, 2022.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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